>>> "Allan Falk" <falklaw@comcast.net> 7/15/2009 3:59 PM >>>
Theoretically, this proposal is a good idea. However, as drafted it has a major flaw--it uses a sledgehammer when a scalpel is desired.

In its current form, the proposal would create mountains of paperwork and administrative burdens for the Grievance Administrator, and subject every attorney who made an arithmetic error in balancing his or her IOLTA checkbook to disciplinary action. Indeed, since every overdraft sets in motion the cumbersome and already glacially slow grievance process, an attorney could find him- or herself facing disciplinary sanctions for writing a check to him- or herself!

Let's be honest. Lawyers are, in general, terrible at math--I don't mean just bad, but abysmal. When I worked for the appellate court system, I had one case in which a lawyer insisted his client, who admitted drinking a pint of booze (and who had the 13 pints of blood in his body that we all pretty much have in common), could not possibly have had a blood alcohol content of .25%--the lawyer thought that .25 and 25% were the same thing (correct) and that .25% was just a third variation on the first two (very wrong). Apparently, neither the trial judge, the prosecutor, his expert witness, or anyone else explained to this shmo that .25% was 1/100th of 25%, and that the "point" made a very big difference in a volumetric analysis of his client's BAC. I could give dozens more examples, going back to the John Norman Collins case, when an expert witness (a physics professor) made a calculation error of 24 orders of magnitude (one trillion trillion, or 1 septillion), and no one recognized the problem until a certain lowly appellate staff lawyer pointed it out.

But irrespective of the discalculia that seems to afflict lawyers even more than the hoi-polloi, everyone makes little errors balancing their checkbook. Under this proposal, if a lawyer makes a tiny error in tracking an IOLTA balance, or forgets to subtract the charge for printing new checks or some other minor detail, and then writes a check for what is believed to be less than or equal to the balance but is a dollar or two too much, Armageddon follows as a matter of course.

Therefore, this proposal needs to have some trigger safeties built into it--first, an overdraft of less than a de minimis amount, say, $100, should not trigger the compendious machinery of the grievance process if, within a short time, say 72 hours of notification of the attorney's office by telephone, e-mail, or facsimile transmission, the overdraft is satisfied by a new deposit, including any NSF charges imposed by the financial institution. I would also add more layers of protection to account for lawyers who are out of town on business or vacation, ill, etc.--in essence, a letter from a doctor or receipts from a trip should be available to extend the 72 hour period (solo practitioners need more such protection than members of large firms--large firms employ bookkeepers and use sophisticated accounting software that should prevent such errors for the most part, and they always have somebody in authority on hand to correct any slipups promptly).

It is particularly important to keep as many innocent errors from the purview of the Grievance Administrator as possible--because as presently constituted and operating, the Grievance Administrator already cannot accomplish much of anything in a reasonable time (exemplars will be provided in disheartening detail on request). Adding to the delay already suffusing every pore of the GA's operations would be a disservice to every lawyer, whether a respondent or a complainant or a witness, that has to deal with the Grievance Administrator. And for those situations that should be brought to the GA's attention, there should be standards built into this rule, rather than a blank check for the GA to continue abusing his authority and acting inconsistently, insouciant of the public interest--delegating unfettered judicial authority, MCR 9.108(A) to an administrator whom the Court chooses not to closely supervise is both unwise and unconstitutional.

While the Court is addressing the subject of trust accounts, it should also add detail to MRPC 1.15(c) to add a prohibition against a lawyer paying him- or herself from a trust account where the client has not had a reasonable opportunity (say, 7-10 days) to review the proposed disbursement and notify the attorney of objections, or where an objection has been made and not resolved either to the client's satisfaction or with the client's agreement or by a judicial determination.

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